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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 3

WILLIAM ALBERTSON and
ROSCOE QUINCY PROCTOR
v.
SUBVERSIVE ACTIVITIES CONTROL BOARD

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR NATIONAL LAWYERS GUILD, As Amicus Curiae

PRELIMINARY STATEMENT

The National Lawyers Guild is a national association of lawyers which, for more than 30 years, has sought to advance the interests of the legal profession, to preserve the integrity and independence of the bar, to promote law as an instrument of social justice, and to defend our priceless constitutional heritage. For these purposes, it has frequently appeared *amicus* in cases involving issues of special concern to the legal profession and in cases involving

constitutional issue having a profound and immediate bearing on the fundamental rights of every citizen. For reasons which this brief will make clear, we believe this case falls into both categories.

This brief is being filed with the written consent of all parties to the case, in accordance with Rule 42, subd. 2 of the Rules of this Court. Communications expressing this consent are printed in the Appendix.

This brief has been prepared with particular reference to the case of Roscoe Quincy Proctor, but it is believed that the argument is in principle equally applicable to the case of William Albertson.

ARGUMENT

If the order under review is based solely on the evidence taken before the Board in this proceeding, it violates First Amendment rights to freedom of speech and association. If it is based in part on other facts or supposed facts, which have not been proved with relation to petitioner Proctor personally, and which he has had no opportunity to rebut, it violates due process of law, or the prohibition against bills of attainder or both.[1]

Petitioner Roscoe Proctor has been ordered to register as a member of a "Communist-action organization." In the light of the findings and definitions contained in the Act, this means he is required to register as a person who is violating Sec. 4(a) of the Act by conspiring to perform acts which would substantially contribute to the establish-

[1] The fact that the argument is limited to this point is not to be taken as any indication that the National Lawyers Guild is not also concerned with the self-incrimination problem, which we assume will be exhaustively discussed by the parties.

ment of a foreign-controlled totalitarian dictatorship, who is also violating 18 U.S.C. Sec. 2384 by conspiring to overthrow the government by force, and who is violating 18 U. S. C. Sec. 371 by conspiring to commit other federal crimes, such as espionage, sabotage, sedition, and possibly treason. It also means that he is to register as a citizen whose legal status is in some ways inferior to that of either an alien or a convicted felon, since he cannot work for the United States, for a defense facility (a concept which is capable of covering most of the labor market, since there are few industries which do not at least potentially affect a nation's ability to defend itself), or for a labor organization (Sec. 5, as amended). Even one of these disabilities standing alone—ineligibility for government employment—has been held to constitute punishment "of a most severe type." *United States v. Lovett*, 328 U.S. 303, 316. Though these disabilities depend on the fact of membership, rather than on registration, the registration puts the public on notice that petitioner has been officially designated as a person to whom these disabilities apply. It creates an official record that Roscoe Proctor is irrebuttably presumed (*Aptheker v. Secretary of State*, 378 U.S. 500, 511) to be a person who will commit espionage and sabotage if given the chance. Furthermore, the registration, since it is required to be made public (Sec. 9), amounts to an official government-sponsored invitation, addressed to employers, prospective employers, neighbors, busybodies, self-appointed vigilantes, and the public generally, to vent upon Roscoe Proctor all the hatred and fear of "Communism" which the excitements and tensions of recent years have generated.

This Court has recently recognized that even a requirement that a single request delivery of mail which has been officially designated "communist political propaganda" is

"almost certain to have a deterrent effect." *Lamont v. Postmaster General,* 381 U.S. 301, 14 L. ed. 2d 398, 402. The deterrent effect becomes very nearly total when one is ordered to register as a potential spy and saboteur whom the public is officially invited to treat as a pariah. A deterrent effect this severe amounts to a blanket prohibition of association, which this Court has warned would endanger legitimate expression and association. *Scales v. United States,* 367 U.S. 203, 229-230. The mere fact that these disabilities and disadvantages may be explained on a preventive basis, rather than a retributive basis, does not prevent them from being punishment in a constitutional sense. *United States v. Brown,* 381 U.S. 427, 14 L. ed. 2d 484, 497. And the fact that the statute may flow from Congressional desire to protect national security will not save if it it unduly infringes constitutionally protected freedoms. *Aptheker v. Secretary of State,* 378 U.S. 500, 509.

That such a registration will be profoundly damaging to petitioner Proctor is obvious. Indeed, the Act shows on its face that the registration was known to have, and intended to have, a drastically punitive effect. When an organization registers, the names of individuals are not to be published until they have had notice and an opportunity to deny the organizational connection (Sec. 9(b)). An elaborate procedure is set up by which those able to prove nonmembership in the affected organizations can get their names removed from the official blacklist (Secs. 7(g), 13(b), 13(i), 14(a)). If the Act were genuinely regulatory, rather than penal and prohibitory in substance and intent, such provisions would not have been thought necessary—or even thought of at all.

Yet all that this record shows—indeed all it attempts or purports to show—is that petitioner was one of a num-

ber of persons known to the witnesses as Communists who worked together for perfectly lawful and proper goals, such as peace and civil rights, and in carrying on the normal internal functions which are essential to the existence of any voluntary association.

If the registration is deemed to follow merely from the facts shown in this record, then petitioner Proctor, in violation of the First Amendment, is being punished for constitutionally protected activities.

This Court, in *DeJonge v. Oregon*, 299 U.S. 353, unanimously held that the peaceful advocacy of perfectly lawful positions on public policy is constitutionally protected notwithstanding the fact that the persons engaging in it may be Communists—and that this is true even on the assumption that Communists are also engaged in unprotected or even unlawful activities. The principle established by this case has not been overruled or by-passed. On the contrary, this Court has continued to insist that this line of demarcation is constitutionally required and must be sharply drawn in each context in which the problem arises. Thus, mere membership in the Communist Party does not justify an inference that an individual shares all its beliefs, *Schneiderman v. United States*, 320 U.S. 118, 136, or that he shares the evil purposes of other members or participates in their possibly unlawful conduct. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246. It does not justify an inference as to the individual's specific intent. *Yates v. United States*, 354 U.S. 298, 331. This Court has held that the relationship between the conduct or status punished and the activity justifying regulation "must be sufficiently substantial to satisfy the concept of personal guilt." *Scales v. United States*, 367 U.S. 203, 224-225. It has warned against employing the concept of membership in such a

way as to give rise to a danger that a person "might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto v. United States,* 367 U.S. 290, 299-300. In *Aptheker v. Secretary of State,* 378 U.S. 500, all these strands were woven together to demonstrate that making a deprivation turn on mere mmbership, excluding "plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes," (*id.* at 514) necessarily violates the principle that regulations affecting basic freedoms must be narrow and precise.

There is not a shred of evidence in this record to suggest that petitioner Proctor has personally engaged in, or even been personally aware of, any activities which would not be constitutionally protected under the above standards.

On the other hand, if this registration order is deemed to be justified in part by facts not found in this record, then petitioner has been deprived of due process of law, both because such facts were not proved against him, *Garner v. Louisiana,* 368 U.S. 157, *Thompson v. Louisville,* 362 U.S. 199, and also because he was given no opportunity to rebut them. *Heiner v. Donnan,* 285 U.S. 312, 325; *Mobile, J. & K C. RR. Co. v. Turnipseed,* 219 U.S. 35, 43; *Bailey v. Alabama,* 219 U.S. 219, 239; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 300-305.

Such a profoundly detrimental status as that to which petitioner is assigned by this registration order cannot be justified by anything short of a showing that the individual is a potential spy and saboteur. We submit that it is plain from the face of the Act that this is the supposed justifi-

cation. The reasoning may be expressed in the form of a syllogism, as follows:

MAJOR PREMISE: All Communists are potential spies and saboteurs.

MINOR PREMISE: Roscoe Proctor is a Communist.

CONCLUSION: Therefore, Roscoe Proctor is a potential spy and saboteur and should be required to register as such.

The peculiar feature of this is that, though both premises are required to justify the result, it is only the minor premise which the government is required to prove—and only the minor premise which the petitioner has been given an opportunity to rebut.

If the major premise is sought in the legislative findings, the Act, as so applied, is clearly a bill of attainder. *United States v. Brown*, 381 U.S. 437, 14 L. ed. 2d 484. Since Congress cannot constitutionally determine that members of the Communist Party are likely to incite political strikes (*id.*, 15 L. ed. 2d 484, 492-493 n 24), it cannot constitutionally determine that they are likely to commit espionage or sabotage.

Nor may the major premise be derived from facts proved or found in the Communist Party registration proceeding.

The taking of testimony in that proceeding closed on July 1, 1952 and was never reopened except for further consideration of matter going to the credibility of witnesses previously heard. The Board's finding rested in substantial measure on evidence of pre-1940 activities. This Court has refused to decide the rights of organizations on a stale record. *American Committee for Protection of Foreign Born v. Subversive Activities Control Board*, 380 U.S. 503; *Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board*, 380 U.S.

513. Surely Roscoe Proctor cannot be deprived of his constitutional rights on the basis of evidence which is even more stale, and which was taken in a proceeding to which he was not a party.

Surrounding circumstances have greatly changed since July 1, 1952. The personnel of the Communist Party must have greatly changed also, especially since the Kruschev revelations about Stalin and the Hungarian uprising which occurred during the interval. It can scarcely be presumed that the Communist Party's activities have remained stable and unchanging, despite changing personnel and circumstances, over so long a period.[2] Nor can it be presumed that the Party's activities have been utterly unaffected by intervening legal developments suggesting that certain activities might tend to subject both the Party and its members to drastic legal consequences.[3] The presumption of continuance is not a rule of law "to be applied in all cases, with or without reason." *Maggio v. Zeitz*, 333 U.S. 56, 65.

Insofar as findings, whether legislative or administrative, look to the future "they can be no more than prophecy and are subject to be controlled by events. A law depending on the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." *Chastleton Corp. v. Sinclair*, 265 U.S. 543, 547-8.

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[2] The record in this case shows that the Communist Party of 1962 operated under the Constitution of 1957 as amended at the national convention in 1959 (Atty. Gen'l's Exhibit No. 1).

[3] The Act does not provide any method by which an unregistered organization can obtain a redetermination of its status, nor any method by which a member may seek a redetermination of his organization's status.

Both the Act and the Board's findings in the Communist Party registration case are based on the theory that the world communist movement is both monolithic and unicen-centered. That theory, however reasonable it may have seemed when the Act was passed or when the Board rendered its findings, does not fit the world revealed by subsequent history. The theory assumes that no country can go Communist without necessarily (almost by definition) falling under the control of the Soviet Union. Yet China went Communist and is not under the control of the Soviet Union. The theory assumes that no national Communist Party is free to reject the policies put forward by Russian Communist leaders. Yet the Albanian Communist Party did exactly that by siding with the Chinese Communist leaders against the Russians. What it in fact did it must somehow have been free to do. A theory which confidently proves the impossibility of what is happening before our eyes is scarcely a sufficient basis for justifying drastic inroads on our traditional and constitutionally-protected liberties—no matter how many legislators and administrators may have endorsed it.

Yet without this theory we have no assurance that there is any such thing today as a "Communist-action organization," as that term is defined in the Act. The Act is not framed to reach *any* foreign domination, or even domination by *any* Communist government. It requires direction, domination, or control by *"the* foreign government or foreign organization controlling the world Communist movement referred to in section 2". (Sec. 3) The Board construed this as a specific reference to the Soviet Union and this Court affirmed that construction. *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 112-113. A Communist organization in the United States which followed the Chinese view would *not* fit this defini-

tion—notwithstanding the fact that the Chinese "line" is much less favorable to the United States than is the Russian. Furthermore a Communist organization free to choose between the Chinese view and the Russian (or to adopt some third alternative) would not be within the purview of the Act—no matter which choice it made.

In any case, even if the findings were fresh, based on contemporaneous evidence, and not in conflict with the observed facts, the inescapable fact would still remain that those findings were not rendered in any proceeding to which Roscoe Proctor was a party and they are therefore not binding on him. "The principle which protects a person against the operation of judicial proceedings to which he is not a party is one of universal jurisprudence, because it is the dictate of common justice." *Renaud v. Abbott*, 116 U.S. 277, 288.

The pretense that we are not punishing the heretic for his opinions, but are only guarding against the misconduct which his opinions might lead him to commit, is the most ancient and threadbare rationalization of persecution. It is the very hallmark of bigotry. Lord Macauley wrote more than a century ago:

> If such arguments are to pass current, it will be easy to prove that there never was such a thing as religious persecution since the creation. For there never was a religious persecution in which some odious crime was not, justly or unjustly, said to be obviously deducible from the doctrines of the persecuted party * * *
>
> The true distinction is perfectly obvious. To punish a man because he has committed a crime, or because he is believed, though unjustly, to have committed a crime, is not persecution. To punish a man *because we infer from the nature of some doctrine which he holds, or from the conduct of other per-*

> *sons who hold the same doctrines with him, that he will commit a crime,* is persecution, and is, in every case, wicked and foolish.
>
> (Historical Essays, London, 1932, pp. 7-8, emphasis added).

It is fundamental to our system that guilt—and merit—is personal. Yet this record tells us nothing about the personal merits of Roscoe Proctor. Indeed it systematically excludes all such material. To try a man in this manner is to deny him any meaningful hearing.

The proceedings under review does not treat Roscoe Proctor as a human being. It treats him as a faceless integer, without qualities or attributes other than an organizational membership. It is not a proceeding in which Roscoe Proctor has been tried. It is a proceeding in which he has been categorized and assigned to a most uncomfortable and injurious pigeon-hole. It is an adjudication, not of conduct, but of status.

We submit that such a proceeding is entirely incompatible with our whole legal and constitutional tradition and that it violates constitutional guarantees of freedom of speech and association, due process of law, and protection against legislative exercise of the judicial function.

Respectfully submitted,

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APPENDIX

OFFICE OF THE SOLICITOR GENERAL

Washington, D.C. 20530
August 6, 1965

James Lafferty, Esq.
Executive Secretary
National Lawyers Guild
Cadillac Tower
Detroit, Michigan 48226

Re: Albertson and Proctor v. United States
October Term 1965 (No. 3)

Dear Mr. Lafferty:

In reply to your letter of August 2, 1965, I am writing to advise you that the government consents to the filing of a brief *amicus curiae* in the above-captioned case on behalf of the National Lawyers Guild.

Sincerely,

/s/ Ralph S. Spritzer
Acting Solicitor General

FORER and REIN

Attorneys at Law

August 10, 1965

James Lafferty, Executive Secretary
National Lawyers Guild
Cadillac Tower
Detroit, Michigan 48226

Re: Albertson & Proctor v. Subversive Activities Control Board, No. 3, Oct. Term, 1965

Dear Mr. Lafferty:

Mr. Abt has asked me to reply to your letter to him of August 2.

The petitioners in the above case hereby consent to the filing of an *amicus* brief by the National Lawyers Guild.

Sincerely,

/s/. Joseph Forer